169 FERC ¶ 61,199
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Constitution Pipeline Company, LLC Docket No. CP18-5-003

ORDER DENYING REHEARING AND STAY

(Issued December 12, 2019)

1. On August 28, 2019, the Commission issued an order on voluntary remand[1] that concluded, in light of the recent decision from the United States Court of Appeals for the D.C. Circuit in *Hoopa Valley Tribe v. FERC*,[2] that the New York State Department of Environmental Conservation (New York DEC) waived its authority under section 401 of the Clean Water Act[3] to issue or deny a water quality certification for the Constitution Pipeline Project.

2. The Commission received timely requests for rehearing from Catherine Holleran[4]; New York DEC; Catskill Mountainkeeper, Riverkeeper, Inc., Delaware Riverkeeper Network, and Sierra Club (collectively Sierra Club); Stop the Pipeline; and Waterkeeper

[1] *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 (2019) (Remand Order). On February 28, 2019, the United States Court of Appeals for the D.C. Circuit granted the Commission's unopposed motion for voluntary remand in the proceeding *Constitution Pipeline Co., LLC v. FERC*, D.C. Cir. No. 18-1251 (challenging the Commission's order on petition for declaratory order in *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 (Declaratory Order), *reh'g denied*, 164 FERC ¶ 61,029 (2018) (Declaratory Rehearing Order)).

[2] 913 F.3d 1099 (D.C. Cir.), *cert. denied*, 2019 WL 6689876 (2019) (*Hoopa Valley*).

[3] 33 U.S.C. § 1341 (2018).

[4] Ms. Holleran and her family own a 23-acre tract in Susquehanna County, Pennsylvania, that is crossed by an easement for the Constitution Pipeline. Catherine Holleran September 27, 2019 Request for Rehearing at 4.

Alliance, Inc. The filings from New York DEC and Waterkeeper Alliance included requests for stay. On October 15, 2019, Constitution filed an answer to the requests for stay. On October 28, 2019, Constitution filed motion for leave to answer and an answer to the requests for rehearing. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to a request for rehearing.[5] Accordingly, we deny Constitution's motion and reject its answer.

3. As discussed below, we affirm the determination in the Remand Order that New York DEC waived its authority.

I. Discussion

4. Section 401 of the Clean Water Act requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States provide to the licensing or permitting agency a certification from the state in which the discharge originates that the discharge will comply with state water quality standards.[6] If the state "fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of [section 401] shall be waived with respect to such Federal application."[7]

5. The Remand Order provides a detailed discussion of the three proceedings related to the Constitution Pipeline Project that are relevant to our discussion here: Constitution's pursuit of a certificate from the Commission under section 7 of the Natural Gas Act (NGA),[8] Constitution's pursuit of a water quality certification from New York DEC, and Constitution's pursuit of a declaratory order seeking a determination from the Commission that New York DEC waived its authority under section 401 through delay.[9]

6. On January 11, 2018, the Commission denied Constitution's petition for a declaratory order, concluding that because Constitution had twice withdrawn and resubmitted its request to New York DEC for a water quality certification, Constitution had restarted the one-year period for New York DEC to act on the request and New York

[5] 18 C.F.R. § 385.713(d)(1) (2019).

[6] 33 U.S.C. § 1341(a)(1) (2018).

[7] *Id.*

[8] 15 U.S.C. § 717f (2018).

[9] Remand Order, 168 FERC ¶ 61,129 at PP 2-13.

DEC therefore had not waived certification.[10] On July 19, 2018, the Commission denied Constitution's request for rehearing of that determination.[11] While Constitution's appeal was pending in the D.C. Circuit, the same court issued an opinion in *Hoopa Valley* vacating a no-waiver determination from the Commission that had rested on the same withdrawal-and-resubmission rationale.[12] The Commission filed an unopposed motion for voluntary remand of the *Constitution* proceedings, which the court granted, to consider the implications of the *Hoopa Valley* decision.[13] On August 28, 2019, the Commission issued an order on voluntary remand that reversed the prior no-waiver determination in light of the holding in *Hoopa Valley*.[14] The Commission concluded that, at a minimum, Constitution's second withdrawal and resubmission of its request on April 27, 2015, had not restarted the time limit for New York DEC to act on the pre-existing request and New York DEC therefore had waived section 401 certification.[15]

A. Jurisdictional Arguments

7. Stop the Pipeline asserts that the Commission has no jurisdiction to decide the issue of waiver. Specifically, Stop the Pipeline claims that because New York DEC denied Constitution's section 401 certification request on April 22, 2016, and the Second Circuit has affirmed the merits of New York DEC's decision, Constitution was required to bring its waiver, or failure-to-act, claim directly to the D.C. Circuit.[16] The Commission fully addressed Stop the Pipeline's arguments in the Remand Order.[17]

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[10] Declaratory Order, 162 FERC ¶ 61,014 at PP 22-23.

[11] Declaratory Rehearing Order, 164 FERC ¶ 61,029 at PP 13-19.

[12] 913 F.3d 1099.

[13] *Constitution Pipeline Co., LLC v. FERC*, Unopposed Motion of Respondent Federal Energy Regulatory Commission, For Voluntary Remand, No. 18-1251 (D.C. Cir. Feb. 25, 2019).

[14] Remand Order, 168 FERC ¶ 61,129.

[15] *Id*. PP 34, 37, 39, 40.

[16] Stop the Pipeline Rehearing at 4-9, 12-13.

[17] Remand Order, 168 FERC ¶ 61,129 at P 15 (citing *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 700-701 (D.C. Cir. 2017) (*Millennium*), in which the court explained that because section 401 provides for waiver of the certification requirement as the built-in remedy for state inaction, the applicant has no injury after

8. As Stop the Pipeline argued earlier in this proceeding, it again asserts that *Millennium*'s directive requiring an applicant to present evidence of waiver to the Commission is limited to situations where the state has not yet rendered a final decision on the application.[18] We disagree.[19] In *Millennium*, the court explained that the purpose of presenting evidence of waiver to the Commission is "to obtain the agency's go-ahead to begin construction."[20] Although we agree with Stop the Pipeline that unlawful delay ending in denial can injure the applicant,[21] the denial of certification does not preclude the subsequent initiation of a proceeding seeking a finding of waiver.[22] Rather, as the court in *Millennium* explained, "[o]nce the Clean Water Act's requirements have been waived, the Act falls out of the equation."[23] Similarly, the Second Circuit has determined that if the state has failed to act by the deadline in section 401, the state's later denial of the request has "no legal significance."[24] Accordingly, the fact that Constitution's waiver

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waiver to confer standing for direct appellate review; rather the applicant must present evidence of waiver directly to the Commission). *See also* Declaratory Order, 162 FERC ¶ 61,014 at P 12 (addressing jurisdiction).

[18] Stop the Pipeline Rehearing at 5-9; Stop the Pipeline April 1, 2019 Supplemental Pleading at 6-7, 12-13.

[19] *See* Remand Order, 168 FERC ¶ 61,129 at P 15 (noting that there is no support for Stop the Pipeline's attempt to distinguish the viability of a waiver claim where the state agency has acted versus has not yet acted).

[20] *Millennium*, 860 F.3d 696 at 700.

[21] *Cf.* Remand Order, 168 FERC ¶ 61,129 at P 15 (mistakenly stating that Stop the Pipeline had "illogically suggest[ed] that unlawful delay ending in denial cannot injure a project sponsor").

[22] A company could satisfy the requirement in the Commission certificate that it receive Clean Water Act authorization either through receipt of a section 401 certification or by showing that certification has been waived.

[23] *Millennium*, 860 F.3d 696 at 700.

[24] *Id.* at 700-01 (declining the project sponsor's request that the court set a deadline for agency action, explaining that after waiver "there is nothing left for the [agency] … to do" and "the [agency's] decision to grant or deny would have no legal significance"); *see also Weaver's Cove Energy, LLC v. Rhode Island Dep't of Envtl. Mgmt.*, 524 F.3d 1330, 1333 (D.C. Cir. 2008) (explaining that after waiver, states' preliminary decisions under section 401 "would be too late in coming and therefore null and void"). We note that the Commission retains discretion, rather than an obligation, to

argument was presented to the Commission after New York DEC denied Constitution's certification request does not invalidate the Commission's authority to consider whether New York DEC waived its certification authority.

9. The Second Circuit's decision in *Constitution Pipeline Co., LLC v. New York DEC* suggests a similar result. There, the court explained that the exclusive jurisdiction given by NGA section 19(d)(2) to the D.C. Circuit to review an "alleged failure to act" by a state agency also encompasses "an allegation that a failure to act within a mandated time period should be treated as a failure to act."[25] Thus, Constitution's argument before the court that "the New York DEC Decision must be treated as a nullity by reason of NYSDEC's failing to act within the prescribed time period under the [Clean Water Act]" was a "failure-to-act claim."[26] The Second Circuit did not speak to or cite the *Millennium* decision, but, given the Second Circuit's conclusion that it lacked jurisdiction over Constitution's waiver claim, there was no reason for the court to address the question whether Constitution must proceed directly to the D.C. Circuit, or, as the D.C. Circuit held in *Millennium*, present evidence of waiver to the Commission.[27]

10. Ms. Holleran asserts that because Constitution did not assert waiver during the Commission's certificate proceeding and subsequent rehearing,[28] Constitution's assertion of waiver here is a collateral attack on the Commission's certificate order and New York DEC's denial of the request for a water quality certification.[29]

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accept conditions contained in a state's late-filed water quality certification. *Cent. Vt. Pub. Serv. Corp.*, 113 FERC ¶ 61,167, at P 9 (2005).

[25] 868 F.3d 87, 99 (2d Cir. 2017).

[26] *Id*. at 100.

[27] *Id*.

[28] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014) (Certificate Order); *Constitution Pipeline Company, LLC*, 154 FERC ¶ 61,046 (2016).

[29] Holleran Rehearing at 2-3, 5, 6-8. Ms. Holleran also claims that Constitution failed its duty to notify the Commission of the waived status of the section 401 water quality certification as required by section 380.12(c)(2) of our regulations. *Id*. at 7-8 (citing 18 C.F.R. § 380.12(c)(2)). We presume that she means to cite section 380.12(c)(9), which requires that the application for a natural gas certificate describe the status of other applications for all authorizations required to complete the proposed project. Constitution's

11. In fact, Constitution's petition for declaratory order did not suggest any infirmity in the Certificate Order and thus cannot be construed as a collateral attack upon it. Rather, Constitution seeks to satisfy the requirement in Environmental Condition 8 of the Certificate Order that, prior to commencing construction, Constitution must file documentation that it has received all applicable authorizations required under federal law, including a section 401 water quality certification, "or evidence of waiver thereof."[30] As is typical in natural gas proceedings, Constitution sought to satisfy that condition after issuance of the Certificate Order. As to questioning the certification, Constitution asserted waiver before the Second Circuit. Further, section 19(d)(2) of the NGA imposes no time limit on an applicant's assertion of waiver. Thus, we find no support for Stop the Pipeline's or Ms. Holleran's assertions that Constitution's waiver claim was not properly and timely brought before us.

12. New York DEC and Stop the Pipeline argue that the Second Circuit's decision in *New York DEC v. FERC* approved withdrawal and resubmission as a viable way to extend the time for a state's review and that this decision should control the outcome here.[31] New York DEC also expresses concern that the Commission's application of *Hoopa Valley* to a situation like the Constitution proceeding forecloses the only viable procedure in cases where more time is necessary for a certifying agency to make a decision,[32] anticipating "an onslaught of denials," often premature due to missing information, and a resulting need for inefficient subsequent section 401 requests to address changes to proposed projects that would result in altered water quality impacts.[33]

13. Addressing this same argument in *Hoopa Valley*, the D.C. Circuit concluded that the Second Circuit's suggestion in *New York DEC v. FERC* that a state could request that

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duty to inform the Commission of the status of its section 401 certification request at the time it filed its application does not require it to apprise the Commission of all possible legal arguments that it might raise at any given stage in the surrounding litigation.

[30] Certificate Order, 149 FERC ¶ 61,199, app., envtl. condition 8.

[31] New York DEC Rehearing at 11-12; Stop the Pipeline Rehearing at 15. *See New York DEC v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) (noting that if a state deems an application incomplete, it could deny the application without prejudice or request that the applicant withdraw and resubmit the application); *see also id.* at n.35 (citing Constitution Pipeline as an example of a withdrawal and resubmittal made at the state agency's request that "restart[ed] the one-year review period").

[32] New York DEC Rehearing at 20.

[33] *Id*. at 20-21.

an applicant withdraw and resubmit the application was not central to the court's holding but was "dicta … offered to rebut the state agency's fears that a one-year review period could result in incomplete applications and premature decisions."[34] The *Hoopa Valley* court went on to say that it is the role of the legislature, not the judiciary, to resolve the state agency's fears.[35] In the same way, the Commission must construe and apply the statute as enacted by Congress.

B. Validity of Commission's Application of Hoopa Valley

14. On rehearing, the parties primarily contend that the Commission applied an unjustifiably broad reading of the *Hoopa Valley* holding in this proceeding.[36] We disagree and affirm our waiver determination, as discussed below.

15. For years, the Commission has criticized the practice of withdrawal and resubmission.[37] Even so, both in the Commission's Declaratory Order earlier in this proceeding and in the Commission's orders on review before the D.C. Circuit in the *Hoopa Valley* case, the Commission reluctantly concluded that because the statutory time limit runs from the date of receipt of a request, and because the statute speaks only to a

[34] *Hoopa Valley*, 913 F.3d at 1105. The application at issue in *New York DEC v. FERC* had not been withdrawn and refiled; rather, at issue was whether the one year waiver period was triggered upon receipt of the certification application or once the state agency deemed the application to be complete. Moreover, the court cited the opinion in *Constitution Pipeline Co., LLC v. New York DEC*, 868 F.3d 87 (2d Cir. 2017), *cert. denied*, 138 S.Ct. 1697 (2018), where the Second Circuit declined, for lack of jurisdiction, to rule on the merits of Constitution's argument that New York DEC waived its certification authority for failing to act within a year of Constitution's initial application notwithstanding the pipeline's withdrawal-and-resubmission of its application. 868 F.3d at 99.

[35] *Hoopa Valley*, 913 F.3d at 1105.

[36] *E.g.*, New York DEC Rehearing at 12 (criticizing the Remand Order for inventing a new interpretation of section 401 to be applied as a categorical rule); Sierra Club Rehearing at 14.

[37] *E.g.*, *PacifiCorp*, 147 FERC ¶ 61,216 (2014); Declaratory Order, 162 FERC ¶ 61,014 at P 23; Declaratory Rehearing Order, 164 FERC ¶ 61,029 at P 17.

state's action or inaction, not to the practice of withdrawal and resubmission, each repeated withdrawal terminated the state's deadline and each repeated resubmission, as a new application, gave the state a new deadline.[38]

16. The *Hoopa Valley* court disagreed with the Commission's conclusion that "each resubmission was an independent request, subject to a new period of review."[39] The court explained that a state's obligation "to act on a request for certification" within one year applies to a specific request and "cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request."[40] The court undertook "an undemanding inquiry" into whether the withdrawal and resubmission scheme in that case would be effective to reset the statutory clock "because Section 401's text is clear."[41] The court concluded that "the pendency of the requests for state certification in this case have far exceeded the one-year maximum."[42] When the applicant for water quality certification each year sent an identical letter to the state certifying agencies purporting to withdraw and resubmit the very same certification request that had been pending before that withdrawal, the applicant's resubmission did not constitute a "new request" such that it restarted the one-year clock.[43] After noting that the statute does not define "failure to act" or refusal to act,"[44] the court found that the states' "deliberate and contractual idleness" defied the requirement for "state action within a reasonable period

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[38] Declaratory Order, 162 FERC ¶ 61,014 at PP 22-23 (asserting that the withdrawal-and-resubmission process is effective "no matter how formulaic or perfunctory"); Declaratory Rehearing Order, 164 FERC ¶ 61,029 at P 17 (same); *PacifiCorp*, 149 FERC ¶ 61,038, at P 20 (2014); *see also Hoopa Valley Tribe v. FERC*, D.C. Cir. No. 14-1271 Brief for Respondent FERC at 20, 23-24 (filed Nov. 14, 2014); *Hoopa Valley Tribe v. FERC*, D.C. Cir. No. 14-1271, Supplemental Brief of Respondent FERC at 4-5 (filed June 8, 2018) (citing the Declaratory Order, 162 FERC ¶ 61,014 at P 23).

[39] *Hoopa Valley*, 913 F.3d at 1104.

[40] *Id*. at 1104.

[41] *Id*. at 1103.

[42] *Id*. at 1104.

[43] *Id*.

[44] *Id*. at 1101.

of time, not to exceed one year" and that the states' efforts "constitute[d] failure and refusal within the plain meaning of these phrases."[45]

17. The *Hoopa Valley* court found waiver based on the text of the statute and the unchanged content of the applicant's requests; the Commission did the same here with respect to Constitution's second withdrawal and resubmittal.

18. In the Remand Order, the Commission applied *Hoopa Valley* to conclude that Constitution's two-page letter dated April 27, 2015, purporting to simultaneously withdraw and resubmit its certification request, as New York DEC had asked for the expressed purpose of avoiding section 401's time limit, was not a "new request" and did not restart the statute's prescribed one-year deadline for state action.[46] The Commission concluded that, at a minimum, New York DEC's inaction pursuant to its functional agreement with Constitution beyond one year from the receipt of Constitution's first withdrawal and resubmission by letter on May 9, 2014, constituted a failure or refusal to act within the plain meaning of those phrases in section 401.[47] Thus, the Commission held that New York DEC waived its section 401 authority with regard to the Constitution Pipeline Project.[48]

19. On rehearing, New York DEC and Waterkeeper Alliance contend that Congress intended that section 401's waiver mechanism would address only prolonged, indefinite, or ongoing delay described variously in legislative history as "sheer inactivity by the State," a state's "dalliance or unreasonable delay," and "indefinite[ ] delay."[49] Waterkeeper Alliance asserts that Congress intended to allow only contemporaneous findings of waiver so that federal agencies can break existing "log jams."[50]

20. The Commission fully addressed these issues in the Remand Order.[51] It is generally assumed—absent a clearly expressed legislative intention to the contrary—"that Congress expresses its purposes through the ordinary meaning of the words it

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[45] *Hoopa Valley*, 913 F.3d at 1104.

[46] Remand Order, 168 FERC ¶ 61,129 at P 39.

[47] *Id.* P 40.

[48] *Id.*

[49] New York DEC Rehearing at 6.

[50] Waterkeeper Alliance Rehearing at 7-8.

[51] Remand Order, 168 FERC ¶ 61,129 at P 37.

uses … .”[52] The *Hoopa Valley* court noted that section 401’s text is clear; it sets a full year as “the absolute maximum” period of time for state action.[53] On its face, the statute’s “*reasonable* period of time” stops at one year.[54] Delay beyond one year is unreasonable and the certification authority is automatically waived.[55] New York DEC and Waterkeeper Alliance would qualify section 401’s time limit to allow a delay for a state’s diligent review[56] or a delay that ends with an untimely state decision.[57] The *Hoopa Valley* court noted at the close of its analysis that there was “no legal basis” to recognize an exception from section 401’s time limit for the coordinated withdrawal-and-resubmission scheme in that case, and that such an exception would “readily consume Congress’s generally applicable statutory limit.”[58] This defeats New York DEC’s and Waterkeeper Alliance’s arguments.

21. *Hoopa Valley* controls our determination here and leads to the conclusions that section 401’s one-year time limit is unqualified and that the statute does not allow exceptions based on the arguments raised by the parties here.[59] The *Hoopa Valley* court

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[52] *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984).

[53] *Hoopa Valley*, 913 F.3d at 1103-04. *See also New York DEC v. FERC*, 884 F.3d at 455 (“The plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state’s action regarding a request for certification ‘shall not exceed one year’ after ‘receipt of such request.’”).

[54] 33 U.S.C. § 1341(a) (emphasis added).

[55] *Millennium*, 860 F.3d at 701.

[56] New York DEC Rehearing at 7.

[57] Waterkeeper Alliance Rehearing at 7-8.

[58] *Hoopa Valley*, 913 F.3d at 1105.

[59] For example, whether: the state’s procedures for public notice and hearing make a decision in one year impossible, Stop the Pipeline Rehearing at 11; the state deems serially-filed supplemental information to be overwhelming or of great impact, e.g., New York DEC Rehearing at 22; the state deems the supplemental information to be insufficient from a recalcitrant applicant, e.g., New York DEC Rehearing at 7; the state’s active, ongoing, and diligent review would take longer than one year, e.g., New York DEC Rehearing at 7, 10; the permit applicant’s withdrawal is voluntary, e.g., New York DEC Rehearing at 6; the permit applicant and the state agree (in some way less formal than a written settlement agreement) to use withdrawal and resubmission (but not

concluded that the statute means what the statute says. A state must act on a request within one year from receipt. Unlike the Endangered Species Act, which allows the participants to agree to extend the deadline for required consultation,[60] there is no provision in section 401 to stop the clock under any circumstance.

22. New York DEC, Sierra Club, and Stop the Pipeline criticize the Commission for focusing on the technique that Constitution used to effect each withdrawal and resubmission, i.e., two identical two-page letters to New York DEC, rather than the additional filings that Constitution submitted to New York DEC before and after each withdrawal and resubmission, which they allege could have constituted "new" requests.[61] New York DEC and Sierra Club extensively describe the communications to and from New York DEC to demonstrate that New York DEC undertook an active, good faith review and did not intend to exploit withdrawal and resubmission.[62] Both New York DEC and Sierra Club claim that New York DEC never reviewed the same application because Constitution submitted several batches of new materials in the months before and after Constitution's second withdrawal and resubmission on April 27, 2015, that "were not part of" Constitution's filings (which New York DEC calls "applications") submitted

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repeatedly use withdrawal and resubmission) to achieve a longer timeline (but not an indefinitely longer timeline) for the state's ongoing review, e.g., New York DEC Rehearing at 8, 9, 10; the agreement excludes no outside stakeholder, e.g., Sierra Club Rehearing at 11; the resulting delay is less than six years, e.g., Sierra Club Rehearing at 11, 12; the permit applicant and the state both truly intended to and did treat the resubmitted request as a "new request," e.g., New York DEC at 6, 9, 10, 22; the unlawful delay has already ended in an untimely decision from the state, Holleran Rehearing at 12; or the entity seeking a waiver determination is the permit applicant who, in its self-interest, agreed with the state to withdraw and resubmit a request, e.g., Stop the Pipeline Rehearing at 13.

[60] 16 U.S.C. § 1536(b)(1), (2) (2018).

[61] New York DEC Rehearing at 22-26; Sierra Club Rehearing at 16-18; Stop the Pipeline Rehearing at 14.

[62] New York DEC Rehearing at 22-24, 26; Sierra Club Rehearing at 12-13, 16-17.

in September 2014[63] and April 2015.[64] New York DEC asserts that some of the submitted additional materials, which numbered in the tens of thousands of pages, were of such great impact that they could have constituted a new request and commenced a new one-year period of review.[65] Similarly, Stop the Pipeline notes that in *Hoopa Valley*, the court emphasized the fact that the applicant's water quality certification request was stagnant for more than a decade.[66]

23. We find these arguments unpersuasive in light of the statement in section 401 that the time for state action runs from "receipt of such request."[67] Thus, Constitution's various submissions[68] to New York DEC following its first withdrawal-and-resubmission letter on May 9, 2014, do not alter the result here. As in *Hoopa Valley*, Constitution's withdrawals and resubmissions, "were not new requests at all."[69]

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[63] Sierra Club appears to refer to Constitution's submission of documents in support of its pre-existing Joint Application. New York DEC Rehearing, appendix at 398-400 (reproducing an email from Constitution to New York DEC describing the content of the "Joint Application support documentation" and reproducing a cover page labeled "Joint Application – Waterbody/Wetland Feature-Specific Support Documentation").

[64] *See* Sierra Club Rehearing at 17-18; *see also* New York DEC Rehearing at 25 (claiming that Constitution's revision to its Joint Application on March 27, 2015, is proof that the request that Constitution resubmitted later via the letter on April 27, 2015, had been changed).

[65] New York DEC Rehearing at 22-26.

[66] *Hoopa Valley*, 913 F.3d at 1104, 1105.

[67] *New York DEC v. FERC*, 884 F.3d at 455 ("If the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.").

[68] *See* Declaratory Order, 162 FERC ¶ 61,014 at P 23 (noting that New York DEC did not review "a static collection of information" after the letter on April 27, 2015).

[69] *Hoopa Valley*, 913 F.3d at 1104.

24. New York DEC received Constitution's second two-page letter "simultaneously withdrawing and resubmitting"[70] its request on April 27, 2015. Constitution's April 27, 2015 withdrawal-and-resubmittal letter did not convey any substantive information to New York DEC. That letter merely withdrew and resubmitted the very same water quality certification request that had been pending in front of New York DEC on that date. In short, because the April 27, 2015 "application" did not contain any additional information that was not already in the certification record pending in front of New York DEC, the April 27, 2015 filing did not constitute a new application.

25. New York DEC points to Constitution's submission of additional information on September 15, 2015[71] as triggering a new request that restarted the one-year clock.[72] We disagree. As we have previously stated, an applicant's submittal of information requested by the state certifying agency during the state's review of the certification request does not render the certification application a "new" application.[73] The Commission has explained that, under the [Clean Water Act], the certification waiver period begins on the

[70] New York DEC April 2, 2019 Supplemental Pleading, app. at 621-22 (reproducing letter).

[71] *See* New York DEC Rehearing, app. at 969-75 (reproducing the cover letter that characterized the filing to contain "updated," "additional," and "supplemental" information for the existing Joint Application).

[72] New York DEC Rehearing at 26. New York DEC states that the filing provided information regarding wetlands and waterbodies for the first time. *Id.* However, it is worth noting that New York DEC had already twice issued a Notice of Complete Application on December 24, 2014, and on April 27, 2015. Remand Order, 168 FERC ¶ 61,129, at P 6.

[73] *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at P 38 (2019) (finding waiver where the applicant twice withdrew and resubmitted its water quality certification application to provide additional time to submit the data requested by the state certifying agency (a water quality monitoring plan and the Commission's draft EA for the project)). We do not agree with the dissent's characterization of our position here and in *McMahan* as being that "the only change that could constitute a new section 401 application for these purposes is a change so significant that it would require a new application with the Commission … ." (dissent at P 7). In *McMahan* we explained that in the absence of unusual circumstances (which were not present there) or major physical modifications to a project, the provision of additional information in response to a state agency's request would typically not create a new application that would give the agency an additional year to act. 168 FERC ¶ 61,185 at P 38 n.43. We did not and do not suggest that there would be no instances in which exchanges between an applicant and a state could result in a new application: we did not find *McMahan* or this case to present such an instance.

date the certifying agency receives the certification request, rather than on the date the agency accepts the request or deems it complete."[74]

26. New York DEC's argument that Constitution's voluntary withdrawals left the withdrawn requests "nullified or no longer valid," leaving nothing for New York DEC to act upon,[75] also fails. Constitution filed a single letter to effectuate a simultaneous withdrawal and resubmittal; there was never a gap in time between the withdrawal and resubmittal.[76] Regardless, even if there had been a gap in time between the withdrawal and resubmittal, our waiver determination turns on whether New DEC's and Constitution's actions as a whole were an attempt to defeat section 401's requirement of action within one year. As we detailed in the Remand Order, New York DEC encouraged Constitution, for the explicit purpose of avoiding section 401's one-year deadline, to withdraw and resubmit an application that New York DEC had deemed complete four months earlier and that New York DEC characterized at the time of resubmission as having "no changes or modifications."[77] This leaves no doubt that New York DEC knew that the request was unchanged upon resubmission. We affirm the conclusion in the Remand Order that New York DEC's and Constitution's actions are analogous to the arrangement that the *Hoopa Valley* court rejected as inconsistent with section 401 and

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[74] *Id*. (citing *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, Order No. 464, FERC Stats. & Regs. ¶ 30,730 (1987) (cross-referenced at 38 FERC ¶ 61,146) (Order No. 464). The Commission's approach is consistent with the U.S. Environmental Protection Agency's guidance for implementing section 401: "an outstanding or unfulfilled request for information or documents does not pause or toll the timeline for action on a certification request. Accordingly, any effort by a state or tribe to delay action past the reasonable timeline due to insufficient information may be inconsistent with the Act and specifically with Section 401. However, just as a federal permitting agency needs sufficient information to issue a permit or license, a state or tribe needs adequate information to issue a Section 401 certification. The EPA recommends that project proponents provide appropriate water quality-related information to the state or tribe to ensure timely action on a request." U.S. Environmental Protection Agency, *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* at 5 (June 2019), https:// www.epa.gov/sites/production/files/2019 06/documents/cwa_section_401_ guidance.pdf. The EPA is the federal agency charged with administering the Clean Water Act. 33 U.S.C. § 1251(d) (2018).

[75] New York DEC Rehearing at 6.

[76] Declaratory Order, 162 FERC ¶ 61,014 at P 3.

[77] Remand Order, 168 FERC ¶ 61,129 at PP 33-34, 39.

ineffective to restart the one-year clock.[78] Thus, as a result of New York DEC's inaction beyond one year from the receipt of Constitution's first withdrawal and resubmission on May 9, 2014, New York DEC waived its authority under section 401 over the Constitution Pipeline Project.

27. New York DEC criticizes the Remand Order's articulation of the general principle from *Hoopa Valley*:

> [W]here an applicant withdraws and resubmits a request for water quality certification for the purpose of avoiding section 401's one-year time limit, and the state does not act within one year of the receipt of an application, the state has failed or refused to act under section 401 and, thus, has waived its section 401 authority.[79]

New York DEC objects that the Remand Order ignores that the *Hoopa Valley* court explicitly declined to determine whether and how the withdrawal and resubmission of a wholly new request or a changed request might restart section 401's reasonable period of time for state action.[80] New York DEC asserts that a standard for waiver that depends in part on the applicant's purpose in withdrawing a section 401 request will force the state certifying agency into the impossible position of having to determine an applicant's intent in deciding to withdraw a request, claiming that applicants could game the system to trick a state into waiver.[81]

28. New York DEC is correct that *Hoopa Valley* did not address a situation where an applicant "withdrew its request and submitted a wholly new one in its place."[82] As discussed above, the Commission has determined here that Constitution did not submit a "wholly new" application, and thus the principle articulated in *Hoopa Valley* readily applies. Should, in a future proceeding, a water quality certifying agency make the case that an application has acted in bad faith in order to trick the agency into waiver, the

[78] *Id.* PP 34, 39-40.

[79] *Id.* P 31.

[80] *Id.*

[81] *Id.* PP 19-20.

[82] *Hoopa Valley*, 913 F.3d at 1104.

Commission will consider that argument. Here, however, the record does not support a claim that New York DEC was in any way misled.

C. Retroactive Application of a Court Interpretation

29. In the Remand Order, the Commission rejected a request to apply *Hoopa Valley* only prospectively because the D.C. Circuit's opinion did not narrow the effect of its decision on pending cases.[83] All parties on rehearing assert this was error.[84] The objections include a charge that the Remand Order's retroactive application of *Hoopa Valley* rests on an overbroad reading of that opinion—arguments that we deny above—but also charges that the retroactive application in general violates various theories of fairness and administrative efficiency such as promissory estoppel, society's interest in finality, due process, and the like.[85]

30. As an initial matter, we note that because the *Hoopa Valley* decision simply enforces the plain language of the existing statute, as opposed to invalidating a rule previously in force or announcing a wholly new rule, the concept of retroactivity appears, at a minimum, misplaced.[86] Moreover, New York DEC's argument, in particular, assumes that the Remand Order announces a new Commission policy outside the scope of the D.C. Circuit's examination of section 401 in *Hoopa Valley.* For the reasons

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[83] Remand Order, 168 FERC ¶ 61,129 at P 19. The Commission noted that the D.C. Circuit itself declined to revisit *Hoopa Valley* to consider whether the decision should only be applied prospectively. *See id.* P 19 n.37.

[84] *See, e.g.*, New York DEC Rehearing at 13-17; Sierra Club Rehearing at 19; Stop the Pipeline Rehearing at 16-18; Waterkeeper Alliance Rehearing at 8; Holleran Rehearing at 5, 7-11. New York DEC contends that Constitution cannot raise an additional argument for waiver based on the intervening *Hoopa Valley* opinion because Constitution did not argue in its petition for a declaratory order that the withdrawal-and-resubmission process is invalid as a general principle. New York DEC Rehearing at 15. The Commission fully addressed this issue in the Remand Order. 168 FERC ¶ 61,129 at PP 16-17. We deny rehearing for the same reasons.

[85] *E.g.*, New York DEC Rehearing at 7, 16-17, 29; Waterkeeper Alliance Rehearing at 8-10; Holleran Rehearing at 9; Sierra Club Rehearing at 19; Stop the Pipeline at 15.

[86] Because Congress established a one-year time period in which the state could consider a section 401 application, the Commission has no authority to extend such period for the state to act.

discussed above, *Hoopa Valley*'s articulation of the plain meaning of section 401 governs the outcome of this case.

31. Nonetheless, we will address the parties' retroactivity arguments. New York DEC asserts that the Commission erred because an agency may not "apply newly formulated administrative policies retroactively."[87] New York DEC errs by relying on principles of retroactivity governing legislation and agency rulemaking.[88] Though significant policy concerns weigh against retroactive application of new rules created through legislation and agency rulemaking, legal rules announced in judicial decision-making typically have retroactive effect and "[r]etroactivity is the norm in agency adjudications[,]" e.g., the Remand Order, "no less than in judicial adjudications."[89] Indeed, with few exceptions, when a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule."[90]

32. Stop the Pipeline claims that the rule of retroactivity in agency and judicial adjudications does not control here, because, as Stop the Pipeline asserts, the Commission must deny waiver on other grounds.[91] First, Stop the Pipeline states that the Commission's lack of jurisdiction to determine waiver is "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief."[92] We have denied this jurisdictional argument in section A above and will not further address the issue here. Second, Stop the Pipeline argues that the rule of retroactivity

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[87] New York DEC Rehearing at 13.

[88] *Id*. at 13 (citing *Landgraf v. UCI Film Products*, 511 U.S. 244, 265 (1994), *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 214-15 (1988)).

[89] *Am. Telephone and Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006); *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 95 (1993) (explaining that the court's role in judicial review lacks the quintessentially legislative prerogative to make rules of law retroactive or prospective as the legislature sees fit and that a court's selective application of new rules violates the principle of treating similarly situated parties the same).

[90] *Harper v. Virginia Dep't of Taxation*, 509 U.S. at 97.

[91] Stop the Pipeline Rehearing at 16-18 (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758-59 (1995) (*Hyde*)).

[92] Stop the Pipeline Rehearing at 16 (quoting *Hyde*, 514 U.S. at 758-59).

should not apply because the principle of equitable tolling "is a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications."[93] Stop the Pipeline asserts that New York DEC has been pursuing its rights diligently, that Constitution's obstructive behavior was an extraordinary circumstance that stood in New York DEC's way and prevented timely action, and that section 401's one-year period for state action is a non-jurisdictional deadline.

33. We disagree. Reliance on the Commission's former interpretation of section 401 does not justify an exception to the rule of retroactivity. The Supreme Court has made clear that "simple reliance" of the type claimed by Stop the Pipeline is inadequate to avoid retroactive application of a judicial decision.[94] Moreover, we noted above that the statutory language does not allow the Commission to consider, when determining waiver, whether the state's diligent review would take longer than one year.[95] Constitution's alleged obstructive behavior did not prevent New York DEC's timely action, because the state could have denied the application within section 401's time limit for reasons of insufficient information or failure to comply with information requests. And section 401's time limit is a jurisdictional deadline because violation automatically waives section 401 by the statute's own terms.

34. Finally, New York DEC, Sierra Club, and Catherine Holleran claim that our application of *Hoopa Valley*'s reasoning here could lead project sponsors or the Commission itself to try years later to invalidate states' section 401 decisions, both grants and denials, that were preceded by a withdrawal and resubmission of the project sponsor's request.[96] These arguments are misdirected. As discussed above, the Commission is constrained by Congress's setting of a firm one-year deadline in section 401.

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[93] Stop the Pipeline at 16 (quoting *Hyde*, 514 U.S. at 759 (emphasis in original)). We note that *Hyde* pointed to the law of qualified immunity for government officers as an example of such a "significant policy justification." 541 U.S. at 759.

[94] *Hyde*, 514 U.S. at 759.

[95] *Supra* P 21 and note 58.

[96] New York DEC Rehearing at 16; Sierra Club Rehearing at 19; Holleran Rehearing at 5, 9, 11.

D. Request for Stay

35. In the Remand Order, the Commission denied New York DEC's request that the Commission stay the effectiveness of a decision finding waiver until the rehearing process or judicial review are complete.[97] The Commission concluded that New York DEC would not suffer irreparable injury without a stay, that a stay would substantially harm Constitution, and that a stay of project construction would not be in the public interest.[98] On rehearing, New York DEC renews its stay request and Waterkeeper Alliance also requests a stay.[99]

36. New York DEC faults the Remand Order for dismissing New York DEC's allegations of irreparable harm based on the contrary conclusion in Commission staff's Environmental Impact Statement (EIS) that impacts from the Constitution Pipeline Project on waterbody and wetland resources will be effectively minimized or mitigated as Constitution fulfills its own and the Commission's mandatory construction procedures and mitigation measures.[100] The EIS has no bearing, according to New York DEC, on the determination whether project construction would result in irreparable harm without the protective conditions from a state's water quality certification.[101] New York DEC asserts that the Commission's assessment based on the EIS cannot take the place of New York DEC's assessment of water quality impacts pursuant to section 401, given the legislative purpose of section 401 to preserve states' authority to protect water quality resources about which states have the most knowledge and expertise.[102]

37. In assessing irreparable harm, the Commission reasonably relied on the Commission's EIS because it analyzed the impacts to waterbody and wetland resources, the same resources that New York DEC asserts will be harmed, and because the EIS drew its conclusions *without* assuming any additional protective conditions from the as-then-undecided state water quality certification. New York DEC points to no specific potential impact and no specific protective condition that the Commission failed to

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[97] Remand Order, 168 FERC ¶ 61,129 at PP 43-53.

[98] Remand Order, 168 FERC ¶ 61,129 at PP 43-53.

[99] New York DEC Rehearing at 26-30; Waterkeeper Alliance Rehearing at 4.

[100] New York DEC Rehearing at 27-28; *see* Remand Order, 168 FERC ¶ 61,129 at PP 43-53.

[101] New York DEC Rehearing at 28.

[102] *Id*.

evaluate in the EIS that, being omitted, might demonstrate irreparable harm to justify a stay. New York DEC's emphasis on the legislative purpose of section 401 to preserve states' authority is counterbalanced, as we discussed above, by Congress's decision to limit the exercise of state authority to one year and New York DEC's own failure to act before its section 401 authority expired.

38. The Commission concluded in the Remand Order that a stay would substantially harm Constitution by delaying Constitution's commencement of service and thus delaying a revenue stream that would begin to offset sunk costs that have accrued over the more than four years (now five years) since New York DEC waived its section 401 authority on May 9, 2015.[103] On rehearing, New York DEC asserts that the Commission lacked record evidence for this determination.[104] Constitution stated in its petition for a declaratory order filed on October 11, 2017, that it had already spent over $380 million on the project.[105] For context, the Commission estimated in the certificate order for the project, based on Constitution's 2013 application and supplemental filings, that all proposed project facilities would cost approximately $683 million.[106]

39. New York DEC also challenges the Remand Order's conclusion that it would not be in the public interest to stay construction of the Constitution Pipeline Project. New York DEC emphasizes that the Commission's reversal in the Remand Order to now conclude that New York DEC waived its section 401 authority undermines "finality and definiteness" for certifying authorities and the general public.[107] These are objections to the retroactive application of the *Hoopa Valley* decision. We address these arguments in section C of this order, above.

40. New York DEC also criticizes the Remand Order for failing to consider New York DEC's companion request that the Commission exercise its discretion to decline to authorize the construction of the Constitution Pipeline Project until Constitution approaches New York DEC again and obtains a section 401 water quality certification or

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[103] Remand Order, 168 FERC 61,129 at P 50.

[104] New York DEC Rehearing at 28.

[105] Constitution October 11, 2017 Petition for Declaratory Order at 3 (Docket No. CP18-5-000).

[106] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at P 6 (2014).

[107] New York DEC Rehearing at 29.

presents new evidence of waiver.[108] New York DEC's request, if granted, would in effect stay the Commission's authorization of the Constitution Pipeline Project until a new section 401 process is complete. The Remand Order fully explained the decision to deny the request for stay until rehearing and judicial review are complete;[109] there is no basis to treat New York DEC's companion request differently. The Commission did not rely on the content of a future section 401 water quality certification when the Commission decided to authorize the Constitution Pipeline Project. There is no legitimate basis for the Commission to effectively stay that authorization and force Constitution to approach New York DEC again, thus negating the agency's waiver of certification for the Constitution Pipeline Project.

41. Waterkeeper Alliance requests that the Commission stay the effect of the determination of waiver at least until the petition for a writ of certiorari from the *Hoopa Valley* parties is finally denied or adjudicated by the U.S. Supreme Court.[110] This request is moot because the Court denied the petition on December 9, 2019.[111]

The Commission orders:

The requests for rehearing are denied and the requests for stay are denied, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

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[108] *Id*. at 17-19.

[109] Remand Order, 168 FERC ¶ 61,129 at PP 43-53.

[110] Waterkeeper Alliance Rehearing at 4.

[111] *See supra* note 2.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC Docket No. CP18-5-003

(Issued December 12, 2019)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because the record does not establish that the New York State Department of Environmental Conservation (New York DEC) waived its authority under section 401 of the Clean Water Act.[1] The majority, by contrast, finds waiver based on a crabbed interpretation of section 401 from which I have previously dissented. Although I cannot join the Commission's finding of waiver on that basis, I recognize that this is a difficult case and believe that the record before us is inconclusive. Accordingly, I would direct the parties to submit additional briefing addressing whether any of Constitution Pipeline Company, LLC's (Constitution) various filings with New York DEC rendered its request for a section 401 certificate sufficiently "different . . . to constitute a 'new request'" under *Hoopa Valley Tribe v. FERC*.[2]

2. *Hoopa Valley* addressed the long-delayed relicensing proceeding for PacifiCorp's Klamath River Hydroelectric Facility on the Klamath River along the border between California and Oregon.[3] To make a long story short, several years ago PacifiCorp apparently came to the conclusion that relicensing the facility would not be cost-effective.[4] PacifiCorp then entered an agreement with the two states and a variety of stakeholders to hold the relevant state licensing proceedings in abeyance while it pursued options for decommissioning the facility.[5] One of the state licensing proceedings PacifiCorp sought to delay involved its request for a certificate pursuant to section 401 of the Clean Water Act.

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[1] 33 U.S.C. § 1341(a)(1) (2018).

[2] 913 F.3d 1099, 1101 (D.C. Cir. 2019), *pet. for cert. denied sub nom. Cal. Trout v. Hoopa Valley Tribe*, 2019 WL 6689876 (Dec. 9, 2019).

[3] *Id.* at 1101.

[4] *Id.* at 1101-02.

[5] *Id.* at 1101.

3. Section 401 requires applicants for federal license that "may result in any discharge into the navigable waters"—a category that includes hydroelectric licenses issued by the Commission—to secure a certificate from the state in which the "discharge originates or will originate."[6] Section 401, however, imposes a time limit on states' review of a certificate request: "If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."[7] To avoid this one-year limitation, PacifiCorp agreed to annually withdraw and resubmit its section 401 application before the one-year limit expired—a task it accomplished each year by submitting a one-page letter, stating its intent to withdraw and resubmit its application.[8] That process had gone on for "more than a decade" when the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decided *Hoopa Valley*.[9]

4. *Hoopa Valley* held that PacifiCorp's withdrawal-and-resubmission tactic did not restart the one-year limitation on the states' review of its section 401 application,[10] meaning that the states had waived their section 401 authority by failing to act on PacifiCorp's application within a year. But the court went out of its way to limit its ruling to the facts before it. The court explained that its decision resolved "a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between a state and an applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year."[11]

5. Most importantly for the purposes of today's order, the court expressly avoided addressing what happens when the applicant modifies its section 401 application before the one-year period elapses. Indeed, the court explicitly "decline[d] to resolve the legitimacy" of an arrangement in which an applicant withdrew its 401 application and

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[6] 33 U.S.C. § 1341(a)(1).

[7] *Id.*

[8] *Hoopa Valley*, 913 F.3d at 1102-04.

[9] *Id.* at 1104.

[10] *Id.* at 1103.

[11] *Id.*; *see also id.* at 1104 (noting that the D.C. Circuit had not previously addressed "the specific factual scenario presented in this case, *i.e.*, an applicant agreeing with the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time").

submitted a new one in its place.[12] Similarly, the court did not address "how different a [section 401 application] must be to constitute a 'new request' such that it restarts the one-year clock."[13] In addition, throughout the opinion, the court referenced a slew of factors that might limit the scope of its decision, including the parties "deliberate and contractual idleness,"[14] the fact that the purpose of the agreement was to delay the license process,[15] the fact that PacifiCorp "never intended to submit a 'new request,'"[16] and the decade-long licensing delay caused by the scheme.[17]

6. That makes *Hoopa Valley* a hard case to apply. On the one hand, the court made clear that the Commission's prior interpretation—that withdrawal and resubmission of a section 401 application restarted the one-year period for review—was wrong. But that is about all that the court resolved. Indeed, as noted, the court identified, but did not decide, a host of questions that will ultimately determine the scope of the waiver rule announced in *Hoopa Valley* and how it applies to proceedings such as this one, which do not fit neatly within the narrow factual circumstance of that case.

7. In the year-and-a-half since *Hoopa Valley* was decided, the Commission has addressed the question of waiver on a case-by-case basis. The Commission has at times unanimously found a state to have waived its section 401 authority where an unmodified section 401 application had been pending before the relevant state agency for more than a year pursuant to an understanding between the applicant and that state.[18] At other times, however, we have disagreed over how to apply *Hoopa Valley* to circumstances that the court went out of its way not to decide. Specifically, in *McMahan Hydroelectric*, we disagreed over the standard for evaluating when a resubmitted application is 'different enough' to constitute a new application for the purposes of section 401's one-year

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* ("This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification"); *id.* at 1105 (describing the set of facts before the court as one "in which a licensee entered a written agreement with the reviewing states to delay water quality certification").

[16] *Id.*

[17] *Id.*

[18] *E.g.*, *Placer Cnty. Water Agency*, 169 FERC ¶ 61,046 (2019).

deadline.[19] In that order, my colleagues appeared to take the position that the only changes that would constitute a new section 401 application are major physical modifications to a proposed project (at least absent some unspecified and undefined "unusual circumstances").[20]

8. *Hoopa Valley* does not require that result.[21] As noted, the court was careful to avoid ruling on what a modified application would mean for section 401's one-year time limit. Nevertheless, the court expressly contemplated that a modification to the section 401 application *itself* could be significant enough for that application to constitute a new application for the purposes of the one-year clock.[22] I see nothing in *Hoopa Valley* or other Commission precedent that supports the majority's presumption that only a major physical modification to a project can restart the one-year clock or that modifications made directly to the section 401 application are immaterial.

9. In any case, I see no reason to so drastically limit what might constitute a new section 401 application.[23] Congress enacted section 401 so that states can ensure that a federally licensed or certificated project does not violate state or federal water quality standards and to permit states to impose such conditions as are necessary to ensure that result.[24] Significant changes in how a project is constructed, operated, or monitored

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[19] *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (2019).

[20] *Id.* P 38 & n.43; *id.* (Glick, Comm'r, concurring in part and dissenting in part at P 4) ("[T]oday's order appears to suggest that additional information submitted to the state after the initial application is irrelevant to determining whether the state waived its authority, unless it reflects a major physical modification of the project.").

[21] *Id.* (Glick, Comm'r, concurring in part and dissenting in part at P 4) ("Nothing in *Hoopa Valley's* reasoning requires the Commission to determine that a state waives its water quality certification authority when the applicant withdraws and resubmits an application that has been significantly modified since the previous submission.").

[22] *Hoopa Valley*, 913 F.3d at 1104.

[23] *Cf. McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (Glick, Comm'r, concurring in part and dissenting in part at P 4) ("It is true that considering whether a significant supplemental submission restarts the one-year clock might make it more difficult for the Commission to find that a state has waived its section 401 authority. But that is not, in my opinion, a persuasive reason to ignore the effects that such submissions might have on the one-year clock.").

[24] *See PUD No. 1 of Jefferson Cnty. v. Wa. Dep't of Ecology*, 511 U.S. 700, 707-08 (1994); *see also S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386

could well determine whether a state can make the water quality findings required by section 401, even if those changes do not require a new application with the Commission.[25] Taking the position that *only* a revised application with this Commission could result in a new section 401 application underestimates the complex and nuanced review that many states undertake in implementing their section 401 authority.

10. This case illustrates the point. Throughout 2014 and 2015, Constitution repeatedly filed revised section 401 applications along with various other amendments and supplements to those applications.[26] Several of these filings occurred between May 9, 2014, and May 9, 2015—the one-year period on which the Commission relies for its waiver finding.[27] The additional submissions addressed a range of issues that would seem directly relevant to a state's ability to determine whether discharges caused by the pipeline would comply with state and federal water quality standards.[28] For example, many of the additional materials addressed the technical details of how the pipeline would cross water bodies—including the roughly 250 streams along the New York portion of the pipeline's route—and whether the project would use open trenches or a trenchless procedure. It should almost go without saying that the construction methods and techniques used to cross those streams could materially affect any discharges in those waterbodies, making those differences potentially essential to the state's ability to evaluate the pipeline's compliance with the Clean Water Act and applicable state law.

11. But today's order concludes that those revisions, amendments, and supplements are immaterial.[29] For the reasons stated above, I do not believe that the Commission is applying the appropriate standard for evaluating waiver under section 401. Nevertheless,

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(2006) (explaining why "Congress provided the States with power to enforce 'any other appropriate requirement of State law'" pursuant to their section 401 authority).

[25] *PUD No. 1 of Jefferson Cnty*, 511 U.S. at 707 (listing the provisions of the Clean Water Act that a state must find a discharge consistent with as part of its section 401 determination).

[26] New York DEC Rehearing Request at 22-24; New York DEC Supplemental Answer and Protest at 11-15.

[27] *Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199, at P 18 (2019) (Rehearing Order).

[28] New York DEC Supplemental Answer and Protest at 11-13; New York DEC Rehearing Request at 22-23.

[29] Rehearing Order, 169 FERC ¶ 61,199 at PP 24-25.

I recognize that this is a particularly difficult case in which to apply *Hoopa Valley* because it turns on the significance of technical changes included within Constitution's revisions, amendments, and supplements to its section 401 application. Rather than finding waiver, I would direct the parties to submit additional briefing addressing those modifications and explain whether—and why—any of them restarted section 401's one-year clock. I believe that that additional information would allow us to do justice to both the rule in *Hoopa Valley* as well as the important federalism and environmental values underlying section 401's reservation of the authority to the states.

12. I would be remiss in failing to note that I supported the finding in the underlying order that New York DEC had waived its section 401 authority. But that was before the Commission announced its policy that, for all intents and purposes, only a physical change to a proposed project could restart section 401's one-year clock.[30] In addition, New York DEC's rehearing request identifies changes that could conceivably have restarted section 401's one-year period.[31] In light of those facts, I believe that we must take a harder look at whether any of Constitution's modifications to its section 401 application restarted the one-year clock and that further briefing is required before we can decide that issue one way or another. Accordingly, I cannot agree with my colleagues that the present record demonstrates that New York DEC waived its authority under section 401.

13. Finally, New York DEC requested a stay pending judicial review.[32] Under the Administrative Procedure Act, an agency may grant a stay "where justice so requires."[33] I would grant the stay. For the reasons stated above, I do not believe that the Commission has established that New York DEC waived its section 401 authority under *Hoopa Valley*. Moreover, given the considerable uncertainty about how *Hoopa Valley* applies outside of the narrow context addressed in that opinion, I believe that the more equitable outcome would be to pause development of the pipeline until the courts provide clarity on waivers of section 401. After all, this is a proceeding in which the Commission has already once changed course: As noted, the Commission originally took the position that the withdrawal-and-resubmission scheme in this proceeding restarted the one-year limitation only to reverse course after *Hoopa Valley*.[34] Although I agree it was

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[30] *See supra* notes 19-20 and accompanying text.

[31] *See* New York DEC Rehearing Request (citing to New York DEC Supplemental Answer and Protest at 11-15).

[32] New York DEC Rehearing Request at 26-30.

[33] 5 U.S.C. § 705 (2018).

[34] *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, at P 8 (2019).

appropriate to reconsider our position in light of *Hoopa Valley*, I am concerned at the prospect of a court again admonishing the Commission that it has misinterpreted section 401, requiring us to make yet another about-face. It would be far better to sort out the waiver question once and for all rather than risking another start-and-stop step in this saga.

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

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